Supreme Court, U.S.
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No. 89-1022

In The

Supreme Court of the United States

October Term, 1989

PEPSICO, INC.,

Petitioner,

vs.

CLINTON SHARP,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

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QUESTION PRESENTED

The question presented is:

1. Was the Petitioner, PepsiCo, Inc., afforded its rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution as a guarantor of the workers' compensation obligations of Lee Way Motor Freight, Inc. to Clinton Sharp?

PARTIES TO THE PROCEEDING

This action was commenced in the Workers' Compensation Court of the State of Oklahoma by Clinton Sharp ("Sharp") against Lee Way Motor Freight, Inc. (Lee Way) on March 8, 1984. Sharp's workers' compensation benefits had been voluntarily paid by Lee Way prior to Sharp's commencement of this action. Lee Way's voluntary payments continued until December 8, 1984. Petition, App. 16. However, prior to ceasing voluntary payments, PepsiCo, Inc., (PepsiCo) on July 27, 1984 guaranteed Lee Way's workers' compensation liability. Petition, App. 4. Upon ceasing voluntary payments, Sharp requested a trial date to determine his right to further weekly compensation benefits, (TTD), and to medical treatment, since ceasing voluntary payments was contrary to the Rules of the Workers' Compensation Court. App. 1. By reason of the guaranty of PepsiCo, notice of trial had on February 25, 1985 was given to Lee Way and to PepsiCo, each of whom appeared at trial represented by the same attorney. Petition, App. 5. App. 4-8.

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Respondent respectfully prays that an order be issued denying the Petition for a Writ of Certiorari as prayed for by the Petitioner.

OPINIONS AND ORDERS BELOW

The opinion of the Supreme Court of Oklahoma affirming PepsiCo's liability for payment of Sharp's workers' compensation award and finding that PepsiCo

was not denied due process of law is correctly reproduced at App. 1, et seq, of the Petition for Writ of Certiorari. However, this opinion is reported at 781 P.2d 814 (Okl. 1989).

APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

In addition to the Appendix of the Petition herein, Respondent appends additional pertinent text of the Oklahoma Workers' Compensation Act.

STATEMENT OF THE CASE

Respondent adopts, with the exception of the following omissions or inaccuracies, the Statement of the Case as set forth in the Petition for Writ of Certiorari.

Proceedings in the Workers' Compensation Trial Court

As stated at page 5 of the Petition herein, Sharp's first trial of his claim for workers' compensation benefits was heard on February 25, 1985 before the Oklahoma Workers' Compensation Court. At that hearing, Lee Way and PepsiCo appeared by and through the same counsel. Petition, App. 5. App. 4-8. PepsiCo has been represented by counsel at every proceeding had on and after February 25, 1985.

Proceedings Before the Supreme Court of Oklahoma

At Page 9 of the Petition, the Petitioner aptly points out an inaccuracy in the Opinion of the Oklahoma

Supreme Court wherein it refers to the trial held on February 25, 1985 as being a "certification hearing", such inaccuracy appearing at Appendix 5, 8, 10, and 11 of the Petition. At Page 10 of its Petition, it goes on to correctly state that the February 25, 1985 hearing was in fact the hearing at which Sharp's award was entered. However, Petitioner inaccurately states thereafter that: "Because no award had been previously entered and because, therefore, Lee Way could not have been in default, ***". Lee Way was, in fact, in default of its statutory obligation to continue its voluntary payment of weekly compensation to Sharp.[1] Notice of the February 25, 1985 hearing, was provided to PepsiCo. Although this hearing was incorrectly classified by the Oklahoma Supreme Court, "The Oklahoma Supreme Court then held that, because PepsiCo was given 'notice of the hearing and an opportunity to be heard, due process requirements were satisfied and the jurisdiction of the Workers' Compensation Court was properly invoked.' " Petition, Page 10.

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[1] Voluntary payment of weekly compensation was commenced by Lee Way on January 1, 1984 and paid until December 8, 1984. Such payment is set forth in the first Order ever issued on Sharp's claim, the same being the Order filed on March 28, 1985 as a result of the hearing held on February 25, 1985. Petition, App. 16. Voluntary payment having been so commenced, it could only be terminated in the event that Sharp had not filed his Form 3 claim, had returned to work full time with Lee Way, or upon voluntary written agreement of the parties that such payments may terminate. App. 1 & 2. Such events did not occur. Therefore, when the Order was filed on March 28, 1985, it provided for a 10 percent interest penalty on the amount past due since December 8, 1984. Such interest penalty is required by Oklahoma Statutes, Title 85, Section 22(5). App. 1-3.

This inaccuracy of classification of the February 25, 1985 hearing may yet be corrected upon motion or sua sponte by the Supreme Court of the State of Oklahoma. Whether or not so corrected, the Petitioner, PepsiCo appeared by and through counsel at the February 25, 1985 hearing. App. 5.

REASONS FOR DENYING THE WRIT

As reasons for granting the Writ of Certiorari, PepsiCo has espoused, as set forth above, the proposition that Lee Way was not in default at the time Lee Way and PepsiCo appeared by and through counsel at the hearing on February 25, 1985. However, at that hearing Sharp requested and obtained an Order for payment of his past due weekly compensation with penalty of 10 percent for each week not paid on and after December 8, 1984. Petition, App. 16. Lee Way had defaulted on its statutory obligations, when it ceased its voluntary payments to Sharp on December 8, 1984. App. 1-3 and 9. Lee Way was therefore assessed the 10 percent penalty in the Order filed on March 28, 1985. Petition, App. 16.

Although the Supreme Court of the State of Oklahoma erroneously categorized the hearing of February 25, 1985 as a "certification hearing", PepsiCo had, **before that hearing**, given the Workers' Compensation Court of Oklahoma its guaranty to pay the workers' compensation obligations of Lee Way. As found by the Order of the February 25, 1985 hearing, Lee Way was in default of its statutory obligation to continue its voluntary weekly

compensation payments to Sharp and was penalized for not so doing.

PepsiCo appeared by and through counsel at that Hearing on February 25, 1985. App. 5. It has so appeared ever after, yet it continues to espouse its denial of its Constitutional right to Due Process under the Fourteenth Amendment to the United States Constitution. It does so upon several propositions.

Lee Way was in default of its workers' compensation payments due Sharp. PepsiCo had given its guaranty of those payments. As stated above, the default of Lee Way and the guaranty of Lee Way's obligations by PepsiCo, occurred prior to the February 25, 1985 hearing. In its reason for granting the Writ of Certiorari, PepsiCo argues that its presence at the February 25, 1985 hearing should not be considered by this Court. The Supreme Court of Oklahoma based its holding that PepsiCo was afforded due process upon its finding that PepsiCo received "notice of the hearing and an opportunity to be heard", as indeed it had. Petition, App. 10, and footnote 6. App. 4-8. However, PepsiCo contends that the Supreme Court of Oklahoma "explicitly rejected as the 'basis for determination of this issue' the presence of PepsiCo's counsel at the February 25, 1985 hearing and his statement that PepsiCo had been served". There was no such "explicit rejection" by the Supreme Court of Oklahoma. The decision of the Supreme Court of Oklahoma, at Appendix 10 of the Petition, clearly states that due process and jurisdiction of the trial court were satisfied by certified notice of the February 25, 1985 hearing being provided to PepsiCo. Thereafter, in footnote 7, the Supreme Court of Oklahoma went on to state that: "Although not the basis

for determination of this issue, it should be noted that PepsiCo appeared at the hearing after filing its 'answer' in which it called itself 'respondent' At the hearing, PepsiCo's counsel stated he represented both Lee Way and PepsiCo and that PepsiCo had been served."

PepsiCo next poses the proposition that since it was not "named or designated as a party-respondent, or made a party by service of process", the Supreme Court of Oklahoma has impermissibly empowered the Oklahoma Workers' Compensation Court to enter judgment against PepsiCo without properly securing personal jurisdiction of PepsiCo.

PepsiCo argues that by reason of *Wilsey, Bennett Co. v. Grant*, 632 P.2d 382, 386 (Okla. 1981), and Rule 13 of the Workers' Compensation Court Rules, it must be named as a party and served with process in this workers' compensation action between the employer, Lee Way and Sharp. In so doing, it continues to assert itself as being the respondent/employer of Sharp. It acknowledges, however, that "the Oklahoma Supreme Court found that PepsiCo was neither Sharp's employer nor an insurance carrier,***." Petition, Page 18. The Oklahoma Supreme Court also determined that *Wilsey, Bennett Co.* was not applicable to the facts herein as PepsiCo was a guarantor who guaranteed the workers' compensation liabilities of its wholly own subsidiary so that Lee Way could remain an own risk employer. Petition, App. 8 and 9.

PepsiCo further argues that the Supreme Court of Oklahoma improperly distinguished *Wilsey, Bennett Co.* as being inapplicable to the facts of this case because of that Court's "***misapprehension that PepsiCo and Lee Way

had a parent-subsidiary or alter-ego relationship" whereas that relationship had ceased on August 6, 1984, a date prior to PepsiCo's receipt of notice and its appearance at the February 25, 1985 court hearing. Petition, Page 19.

Although this relationship of Lee Way and PepsiCo had ceased prior to the February 25, 1985 hearing, when the decision of the Oklahoma Supreme Court is read in its entirety, its wording "of its wholly owned subsidiary", appearing at Appendix 9 of the Petition, is surplusage. This is so because PepsiCo had, on July 27, 1984, provided to the Oklahoma Workers' Compensation Court its guarantee that it would be responsible for any liabilities that Lee Way might incur under the Oklahoma Workers' Compensation Act. Petition, Page 3. In deciding Sharp, the Oklahoma Supreme Court held that PepsiCo "***became immediately liable under the guaranty only when Lee Way failed to pay Sharp's workers' compensation award.[6]" Its footnote 6 states that: "Guaranty law provides that '[a] guarantor of payment or performance is liable to the guarantee immediately upon the default of the principal, and without demand or notice. Okla. Stat. tit. 15, Section 332 (1981)." Petition, App. 10. Therefore, contrary to PepsiCo's assertion that *Wilsey, Bennett Co.* was distinguished and rejected contrary to law or fact because no "parent-subsidiary or alter-ego relationship" existed at the time it was given notice and appeared at the February 25, 1985 hearing, the date applicable to its status as a guarantor was December 9, 1984, the date when its principal, Lee Way, defaulted on its statutory

obligation to continue payments to Sharp, whereby PepsiCo, as guarantor, became liable upon its guarantee without demand or notice.

CONCLUSION

As guarantor of the obligations of Lee Way, which obligations are statutorily imposed by the workers' compensation law of Oklahoma, PepsiCo entered its appearance at the commencement of Sharp's hearing wherein he sought an Order of the Workers' Compensation Court of the State of Oklahoma. Sharp obtained such Order. Such Order was obtained solely against Lee Way. Petition, App. 15. By reason of Oklahoma Statute, Title 15, Section 332, Sharp would have enforced that Order by bringing suit in a Court of unlimited jurisdiction against PepsiCo by reason of PepsiCo's guaranty of payment of such Order. He would have, except for the fact that although the Workers' Compensation Court of the State of Oklahoma is a Court of limited jurisdiction, its jurisdiction is exclusive in the field in which it operates, abrogating the common-law right of action for damages by an employee, and substituting an exclusive remedy in place of all other liability. *Carroll v. District Court of Fifteenth Judicial Dist. Court, Cherokee County, Okl.*, 579 P.2d 828 (Okl. 1978). Thus, the liability of Lee Way, guaranteed by PepsiCo, was so determined by the Workers' Compensation Court.

For the foregoing reasons, PepsiCo has been fully afforded its rights under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States of America. Its Petition for Writ of Certiorari to the

Supreme Court of Oklahoma should, therefore, be denied by this Honorable Court.

Respectfully submitted,

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APPENDIX A

85 Ch. 4, App.
Rule 15

Okla. Stat. Title 85, ch. 4, App. Rule 15 (1981)

Termination of Temporary Compensation

The employer may terminate temporary compensation, whether begun voluntarily or by order, without a new order of the court in the event that, (1) the employee has not filed either a Form 3 or Form 3b with the court, (2) the employee returns to full time employment with that employer or, (3) the parties voluntarily agree in writing that such payments may terminate. A copy of this agreement shall be filed with the court if the employee has filed either a Form 3 or Form 3b. In all other events, temporary compensation may be terminated only in the manner to be stated herein. The employer shall file with the court and mail to the employee copies of its Motion to Set for Hearing (Form 11). If the reason for the employer's request to make such termination is based upon the written medical report of a physician who indicates that the employee has been released from the physician's professional care and is able to return to work, then a copy of that report, which is to be offered at the hearing, shall be attached to Form 11. The attached medical report shall not be considered as part of the evidence before the court unless it is admitted at the subsequent hearing. The employee shall then have fourteen (14) days from the date that he has received the

employer's Form 11 in order to file with the court and to mail to the employer copies of his Objection to the Termination of Temporary Compensation. This objection shall be on a Form 12 and shall state the reason for the employee's objection. If that reason is based upon a medical report to be offered by the employee at the hearing then a copy of that report shall be attached to the Form 12. Unless the objection has been filed by the employee within the above fourteen (14) day period, the employer may then terminate temporary compensation retroactively to the date the Form 11 was filed with the court. The time for filing such an objection may be extended for a reasonable period of time upon written application by the employee either to the Presiding Judge or the Judge to whom the matter is assigned provided that the application shall state the following: (1) the name of the physician who is to examine the employee, (2) the date the examination is to be made, (3) the date the employee made the appointment for such examination, and (4) the date the employee expects to have the medical report from said examining physician.

Upon the receipt of the employee's Objection to the Termination of Temporary Compensation, the docket clerk of the court shall set the matter for hearing on a priority basis giving ten (10) days notice to all parties. The matter shall then be heard ahead of any other pending matter before the court, except for Objections to the Commencement of Temporary Compensation as provided above. The employer shall continue to pay temporary compensation until further order of the court even if this occurs after the requested hearing but the employer shall be entitled to receive credit for any over-payment of

temporary compensation against any subsequent order for permanent compensation. (Emphasis added.)

APPENDIX B

BEFORE THE WORKERS' COMPENSATION COURT
OF THE STATE OF OKLAHOMA

CLINTON SHARP, CLAIMANT,	)	
VS.	)	NO. 84-3754-K
LEE WAY MOTOR FREIGHT AND/OR PEPSICO, RESPONDENT,	)	
OWN RISK, INSURANCE CARRIER.	)	

TRANSCRIPT OF PROCEEDINGS
ON FEBRUARY 25, 1985
IN OKLAHOMA CITY, OKLAHOMA

HONORABLE JACQUE JEFFRIES BRAWNER, JUDGE

APPEARANCES:

Mr. Jim Grennan, Attorney at Law, 2000 Classen Center 120 South, Oklahoma City, Oklahoma 73106
Appearing on behalf of Claimant,

Mr. Albert M. Morrison, Attorney at Law, 1212 NW 50th, Oklahoma City, Oklahoma 73118
Appearing on behalf of Respondent and Carrier.

Reported by:

Barbara Barrowman, C.S.R., R.P.R.
Official Reporter
Workers' Compensation Court.

PROCEEDINGS

BY THE COURT: This is the case of Clinton A. Sharp versus Lee Way Motor Freight and/or Pepsico. There was an accident on December 21st 1983. This gentlemen injured his back. The rates in this case are $212.00, $159.00. Temporary was paid in this case from January 1st '84 to December 8th 1984. Temporary is owing in this case from December 9th '84, continuing. The issue of permanent disability has been reserved.

All of this has been agreed by stipulation. Mr. Grennan has asked for interest on the non-payment and the only real issue in this case is should this Order be written against Lee Way or against Lee Way and Pepsico. I think Counsel would like to make some comments on this issue. Mr. Morrison.

BY MR. MORRISON: Pepsico has been served and I am appearing as attorney for Pepsico, also. And, at this time, we would object to any order being written against Pepsico as they are only a guarantor and there's no Order of the Court that Lee Way has failed to comply with that would fall within the terms of the Guarantee Agreement, assuming the Guarantee Agreement would apply to this case, which we do not admit at this time.

BY THE COURT: All right. Mr. Grennan.

BY MR. GRENNAN: By way of response, the Guarantee, as of record out of the Court, and we have furnished the Court a copy of that Guarantee this morning. We feel that it is applicable, being a Guarantee, it is applicable to the issue here this morning.

And we would ask that the Court specifically find in the Order that this Guarantee, by its terms, is actually guaranteeing payment and Pepsico, Incorporated, as Guarantor of the Order of this Court. And, we would ask that a specific finding be made a part of the Court's order ordering payment by either Lee Way, Incorporated or Pepsico, Incorporated as Guarantor for Lee Way.

BY THE COURT: Anything else?

BY MR. MORRISON: In that event, Your Honor, I would argue that the accident occurred prior to the terms of the Guarantee Agreement at the time when Lee Way Motor Freight was a qualified own risk carrier and that they are the only parties that are liable. The Guarantee Agreement does not cover this accident in any way, shape, form or fashion.

And also, we would argue that the Guarantee Agreement had been revoked, by letter, prior to time this case was called for hearing, and therefore, has no force and effect at this time.

BY THE COURT: Anything further, Mr. Grennan?

BY MR. GRENNAN: The Order, of course, Your Honor, speaks for itself. That beings with, to enable the continuing compliance by Lee Way and because the nature of the claims in this Court and because of the nature of Pepsico making that Guarantee of continuing compliance, we feel that the Guarantee covers all obligations that were in effect as to Lee Way at the time under their Own Risk permit, which would include Mr. Sharp's claim and in which Lee Way had acknowledged the claim and had been making payment.

And we think the Guarantee is simply, as stated therein, given to this Court to enable the continuing compliance by Lee Way in guaranteeing and assuring this Court that the obligations of Lee Way, under the Own Risk Permit, would be met by either Lee Way or Pepsico, as their guarantor in order to permit the continued complicance (sic) or continued own risk permit with Lee Way before this Court.

And we feel that the Court took that Guarantee on that basis from the own risk file of this Court permitting Lee Way to continue on as own risk on their claims because of this Guarantee given to those claims that Lee Way had also, one of which was Mr. Sharp's claim. And we feel that the Guarantee is in effect as to those claims, including Mr. Sharp's.

BY THE COURT: Is there anything further in this case?

BY MR. MORRISON: Nothing further. Respondent rests.

BY MR. GRENNAN: Nothing further.

BY THE COURT: You may be excused.

(End of proceedings.)

BEFORE THE WORKERS' COMPENSATION COURT
OF THE STATE OF OKLAHOMA

CLINTON SHARP, CLAIMANT,	)	
VS.	)	NO. 84-3754-K
LEE WAY MOTOR FREIGHT AND/OR PEPSICO, RESPONDENT,	)	
OWN RISK, INSURANCE CARRIER.	)	

CERTIFICATE OF COURT REPORTER

I, Barbara Barrowman, a Certified Shorthand Reporter, and one of the official court reporters in and for the Workers' Compensation Court of the State of Oklahoma, do hereby certify that the within and foregoing is a full, true, correct and complete transcript of my stenographic notes of the trial proceedings had and heard in the above-styled and numbered cause on the 25th day of February 1985, in Oklahoma City, Oklahoma, before Judge Jacque Jeffries Brawner.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal this 18th day of September, 1988.

/s/ Barbara Barrowman (SEAL)
BARBARA BARROWMAN,
C.S.R. within and for
the State of Oklahoma.

APPENDIX C

Oklahoma Statutes, Title 85, Section 22(5)

Schedule of compensation.

5. Notwithstanding any other section of the Workers' Compensation Act, temporary disability shall be payable without an award by the Court. The first payment of temporary disability compensation shall become due on the tenth day after the employer has received notice of injury as specified in Section 24 of this title. All compensation owed on that date shall be paid and thereafter payments shall be made weekly except when otherwise ordered by the Court.

If any compensation payments owed without an award are not paid within ten (10) days after becoming due there shall be added to such owed payments an amount equal to ten percent (10%) of the amount due which shall be paid at the same time in addition to the owed payments unless such nonpayment is excused by the Court after a showing by the employer that conditions exist over which the employer had no control in that either payments were not made within the prescribed time or the employer denies coverage within the time specified for employer to respond.